

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	
In the Matter of Protest of:)	DECISION
)	CASE No. 2010 - 157
)	
Security Management of SC, LLC)	
)	
)	
Materials Management Office)	POSTING DATE: February 28, 2011
IFB No. 5400002358)	
Security Guard Services for)	MAILING DATE: February 28, 2011
<u>Florence-Darlington Technical College</u>)	

This matter is before the Chief Procurement Officer (CPO) based on a letter of protest from Security Management of South Carolina, LLC (Security). With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure security guard services for Florence-Darlington Technical College (FDTC). In the letter, Security protested MMO's notice of intent to award to Stealth Security, LLC (Stealth) pursuant to Section 11-35-4210(1)(b) of the South Carolina Consolidated Procurement Code (Code) alleging I) Stealth submitted a non-responsive bid which materially deviated from the requirements of the IFB and II) the determination that Stealth was a responsible party is erroneous.

In order to resolve the matter, the CPO conducted a hearing February 15, 2011. Appearing before the CPO were Security, represented by E. Wade Mullins, Esq.; Stealth, represented by Greg Van Wert, Owner; FDTC, represented by Lorena McLeod, Procurement Director; and MMO, represented by John Stevens, CPPB, State Procurement Officer.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On November 3, 2010, MMO published the IFB. (Ex. 1)
2. On November 16, 2010, MMO and FDTC conducted a pre-bid conference.
3. On November 19, 2010, MMO issued Amendment #1, which was the only amendment to the IFB. (Ex. 2)
4. On December 9, 2010, MMO opened the bids received as follows:

<u>Bidder</u>	<u>Total Annual Bid Amount</u>
Stealth	\$461,047.60
Security	473,420.48
Defender Services	495,910.48
Diamond Detective Agency	506,903.28
Amer Services, Inc.	514,907.12
A Services Group, LLC	514,937.28
Allied Barton Security Services	518,879.92
DSI Security Services	538,315.44
National Alliance Security Agency	548,516.80

(Ex. 5)

5. On December 20, 2010, MMO posted its intent to award to Stealth. (Ex. 3)
6. On December 30, 2010, Security filed its protest with the CPO.
7. On January 4, 2011, according to law, MMO suspended its intent to award. (Ex. 4)

SUMMARY OF THE SECURITY SERVICES BEING PROCURED

With this IFB, MMO seeks bids for security services for “maintaining a safe and secure college environment that is free from violence, improper or disruptive behavior, intimidation and for the protection of all facilities and equipment from loss or misuse . . .” The services were sought for FDTC’s Main Campus, the Health Science Campus, the SIMT Campus, and the Cosmetology Site. (Ex. 1, p. 13,

Scope of Solicitation) The solicitation required that the security officers assigned perform general security duties as follows:

- 1) Report any unusual incidents or hazardous conditions as soon as possible to representatives designated by FDTC. These may include, but not be limited to, fire, criminal activity, theft, chemical spills, telephone outage, power outage, equipment malfunction, etc. This is also to include any formal complaints and/or concerns brought to their attention by any students, faculty, visitors, vendors, etc.
- 2) Submit a written report covering **all incidents** or **hazardous conditions** referenced above at the conclusion of each tour.
- 3) Perform all specific duties in accordance with bid requirements. These duties shall include, but not be limited to, inside patrol areas, work schedules, contact personnel, maintaining daily activity log and any other duties as may be specified in the Other Provisions section of this bid package.
- 4) Officer personnel shall also perform any additional future duties which FDTC and contractor may agree upon in writing after these duties have been duly authorized in writing by proper authority. Such duties may include, but not be limited to, monitoring of specific plant equipment and exterior security lighting, inspection of fire detection and control equipment, outside patrol areas which may require use of vehicle, traffic and crowd control, permanent assignment of security officers, etc.
- 5) Upon request by either party, designated vendor management shall meet with the college Director of Facilities for the purpose of discussing any problems which may arise and the proper resolution of these problems. (Ex. 1, p. 15, General Duties)

The security guard services sought by the IFB are unarmed. According to Richard Brinkley, MMO Procurement Manager, the services required include reporting and documenting incidents or hazards. According to Harrison Ford, FDTC Director of Physical Facilities, and the on-site contract administrator, the security guard services also require crowd control twice per year for student registration and for activities such as a Welding Rodeo that requires overnight guard of exhibits stored in tents, blood drives, and one SIMT event of about 800 people annually. Many of the events and conditions of larger college campuses that can be problematic for security, such as athletics, dormitories, and alcohol-serving events, are not held at FDTC. Campuses are patrolled by the local

Sheriff's Department, and security guards are not allowed to intervene in serious incidents such as physical altercations (fights), but rather must call the Sheriff's Department. Mr. Ford referred to the security officers as ambassadors for FDTC and described the security services required by FDTC as opening gates after hours, receiving shipments on weekends, locking doors, checking facilities, and writing parking tickets.

CONCLUSIONS OF LAW

I) Allegation that Stealth submitted a non-responsive bid which materially deviated from the requirements of the IFB

The Code requires that notice of an intended award of a contract be made to the lowest responsive and responsible bidder whose bid meets the requirements set forth in the IFB. S.C. Code Ann. § 11-35-1520(10). A responsive bidder is defined as "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids..." S.C. Code Ann. § 11-35-1410(7).

Security alleged that Stealth's bid was non-responsive because it failed to include all of the information required under the IFB. First, Security alleged that the references submitted by Stealth involved minimal services provided to companies for not more than a day or two and therefore they were "not reflective of a bidder who possessed the qualifications, experience and expertise to perform a contract of this size and scope." Second, Security alleged that Stealth's bid did not meet the requirement that each bidder maintain a business office within 100 miles of FDTC.

Regarding the references allegation, the IFB required each bidder to "List of at least three (3) business references that your company has done business with in the last five (5) years. Current name of business, telephone number, contact persons name and dates of contractual service must be provided."

(Ex. 1, p. 22, Information For Offerors to Submit) Stealth submitted four references: Bass Pro Shop, Wake Stone Corporation, Professional Retail Services, and Low Country Food Bank. (Ex. 6)

The CPO finds that Stealth's references are responsive to the IFB. Contrary to Security's argument, the IFB did not require that references include any particular duration of services or that the referenced contracts be representative of the services being solicited here. The IFB only required submittal of three references. Stealth met that requirement by submitting four references.

Regarding the allegation that Stealth's bid was also nonresponsive because it did not satisfy the IFB's requirement concerning the business office, the IFB required the contractor to "maintain a business office within 100 miles of Florence-Darlington Technical College which is properly equipped and staffed to carry out all normal business functions..." (Ex. 1, p. 17, Other Provisions) Stealth argued that it had submitted its bid from 1016 Great Lakes Circle, Myrtle Beach, SC 29588, which is Stealth's principle place of business according to Mr. Van Wert, Stealth's owner. Further, Mr. Van Wert submitted a lease recently signed by Stealth for office space located at 3100 Dick Pond Road, Myrtle Beach, SC. Mr. Van Wert asserted that both locations are within 100 miles of FDTC. In contrast, MMO argued that the IFB did not even require the bidder to maintain such an office at the time of bidding but rather than it was a performance obligation and did not go to the issue of responsiveness.

The CPO agrees that the IFB does not impose the requirement of an office within 100 miles of FDTC as a prerequisite for bidding; instead it requires that the awarded bidder - the contractor - maintain an office within 100 miles of FDTC during performance of the contract. Therefore, Security cannot prove that Stealth was non-responsive in this regard.¹ Accordingly, the CPO denies Security's allegation that Stealth was non-responsive for failing to meet material requirements of the IFB.

¹ Even if the IFB required an office within 100 miles of FDTC as a prerequisite for bidding, Security failed to meet its burden of proving its allegation regardless.

II) Allegation that the determination that Stealth was a responsible party is erroneous

Security also alleged that the procurement officer's determination that Stealth was a responsible bidder was arbitrary, capricious and clearly erroneous. Security based its allegation on several factors. First, Security argued that Stealth had only been in business for a few months and that the references provided were inadequate and did not reflect that Stealth had a satisfactory record of performance or the capability to perform the contract requirements. Second, Security argued that the determination was flawed because the procurement officer did not request any financial information in order to determine whether Stealth had the financial resources to perform the contract. Security acknowledged Mr. Brinkley's running of a Dunn & Bradstreet (DUNS) report of Stealth's financial stability, but argued that the DUNS report reflected little or no credit eligibility. Finally, Security argued that the information submitted by Stealth does not support a determination that Stealth is qualified legally to perform the services.

The Code requires the procurement officer to determine a bidder's responsibility before awarding them a contract. Section 11-35-1520(10). The Code defines a responsible bidder as "a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance." Section 11-35-1410(6). Section 11-35-1810(1) of the Code also states "Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contract and based upon past record of performance for similar contracts." A procurement officer's responsibility determination is a matter of discretion and cannot be overturned unless the protestant shows it was "clearly erroneous, arbitrary,

capricious, or contrary to law.” S.C. Code Ann. 11-35-2410(A). In Protest of Value Options, Case No. 2001-7, the South Carolina Procurement Review Panel noted that procurement officers are given broad discretion in making their responsibility determinations because these are a matter of business judgment. The Panel explained that “[t]o prove arbitrary and capricious conduct such as will permit the court to overturn a procurement decision, the aggrieved bidder must demonstrate a lack of reasonable or rational basis for the agency decision or subjective bad faith on the part of the procuring officer or clear and prejudicial violation of relevant statutes and regulations which would be tantamount to a lack of reasonable or rational basis.” Id., citing Robert E. Derecktor of Rhone Island, Inc. v. Goldschmidt, 516 F.Supp. 1085 (U.S.D.C. Rhode Island 1981); See also generally, Leventis v. SC Dep’t of Health and Environmental Control, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000)(finding that the agency is the ultimate fact finder and its findings are not clearly erroneous even where they differ from the hearing officer’s.)

On April 20, 2010, Mr. Brinkley determined in writing that Stealth was a responsible bidder. (Ex. 8) At the hearing, he testified that in making his responsibility determination he relied upon the references attached to the bid as well as additional information supplied to FDTC by Stealth upon request, a DUNS report, as well as input from FDTC.² Mr. Brinkley explained that he not only considered Stealth’s references, which were positive, but also Mr. Van Wert’s personal lengthy experience working in the security industry. Mr. Brinkley also testified that he did not put much emphasis on the financial aspects of the DUNS report both because of the type of service being procured and because, based on his own years of experience in banking, accounting, and procurement,

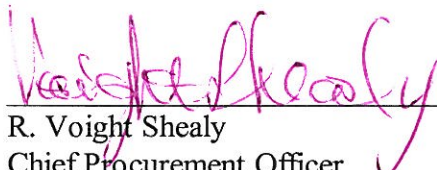
² Mr. Brinkley’s solicitation of input from FDTC was not addressed in the written determination. During testimony, however, it became clear that both Ms. McLeod and Mr. Ford were critical resources providing Mr. Brinkley with information and advice regarding Stealth’s responsibility. As an aside, the CPO finds Mr. Brinkley’s support from FDTC to be completely appropriate. As the recipient of the services being procured, and the on-site administrator of the contract, FDTC has the most to lose should Stealth not perform. According to Mr. Ford, he considered Stealth’s references satisfactory. Asked if he felt Stealth could do the job, he stated “I believe they can do the job.”

its findings were not unexpected for a relatively new business like Stealth's. Never-the-less, Mr. Brinkley explained that he had a discussion with Mr. Van Wert regarding his finances and felt comfortable that Stealth could satisfactorily perform the contract.

The CPO finds that Security failed to meet its burden of proving that Mr. Brinkley's responsibility determination was clearly erroneous, arbitrary, capricious, or contrary to law.³ Accordingly, this allegation is also denied.

DETERMINATION

For the aforementioned reasons, the protest of Security is denied.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services



Date

Columbia, S.C.

³ At the hearing Security also attempted to raise an allegation that Stealth was also nonresponsible because it was not legally qualified to contract since it was in between offices & running the administrative matters out of a home that Mr. Van Wert was renting at the time of the determination and that rental home was not zoned for commercial use. First, this issue was not sufficiently raised; there was no way the parties could have been on notice of this argument based on the protest letter. Never-the-less, Security failed to prove that Stealth was not qualified legally. The evidence from the South Carolina Secretary of State reflects that Stealth was in business at the time and was not dissolved. Security offered no evidence that a zoning infraction would take a company out of existence. Therefore, Stealth was legally qualified to contract, and Mr. Brinkley's responsibility determination was not clearly erroneous, arbitrary, capricious, or contrary to law based on this argument either.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised October 2010)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2010 S.C. Act No. 291, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

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LEAH EDWARDS GARLAND
BENJAMIN C. BRUNER

December 30, 2010

AUTHOR'S E-MAIL:
WMULLINS@BRUNERPOWELL.COM

VIA ELECTRONIC AND HAND DELIVERY:

Voight Shealy
Chief Procurement Officer
Materials Management Office
1201 Main Street
Columbia, SC 29201

**Re: Security Management of South Carolina, LLC
Bid Protest – Security Guard Services for Florence-Darlington Tech.
College
Solicitation No.: 5400002358
Our File No: 7-879.102**

Dear Mr. Shealy:

This firm represents Security Management of South Carolina, LLC, ("SMSC") in connection with the above referenced solicitation. On behalf of SMSC, we hereby protest the intent to award the contract for Security Guard Services for Florence-Darlington Technical College to Stealth Security, LLC, ("Stealth") and request a hearing and administrative review. Materials Management Office ("MMO") originally posted an Intent to Award to Stealth on December 20, 2010. SMSC, as a bidder in this procurement and, pursuant to S.C. Code Ann. § 11-35-4210(1), has standing to pursue a protest. The protest is based upon the following factual and legal basis:

SMSC protests the notice of intent to award the subject contract to Stealth because Stealth is not a Responsive or Responsible Offeror and because Stealth did not meet the material and essential requirements of the IFB with respect to performance.

I. Stealth submitted a non-responsive bid which materially deviated from the requirements of the IFB. Stealth's bid should have therefore been rejected.

This procurement involves an Invitation for Bid ("IFB") to solicit bids from various contractors in or to provide security services for Florence-Darlington Technical College ("FDTC"). The contract is to include all reasonable and necessary labor, supervision, material, equipment, supplies and transportation necessary to provide the required level of service for the FDTC campuses. The IFB contained specific material requirements regarding the contract, including requirements relating to the business office of the vendor.

Section III - Scope of Work/Specifications sets forth as follows:

Security Agency Office

A business office shall be maintained which is properly equipped and staffed to carry out the normal business functions of a private security agency. Any additional means as may be necessary to fulfill the requirements of this bid package and specifications shall be established. (IFB, P.13)

Security Specifications

Other Provisions

- (1) Contractor must be licensed to do business in South Carolina and in Florence and Darlington Counties and shall meet all of the requirements established by law for the operations of a private security business in the State of South Carolina; shall possess a current license issued by SLED and shall maintain a business office within 100 miles of Florence Darlington Technical College which is properly equipped and staffed to carry out all normal business functions and shall establish any additional means as may be necessary to fulfill the terms and conditions of this agreement. (IFB, P. 17)

Upon information and belief, Stealth's bid is nonresponsive in that its business and office do not satisfy the material requirements of the IFB set forth above.

The IFB required the submission of information concerning a bidder's qualifications, including information relating to (1) licensing and training; (2) references for prior projects and contracts; and (3) number of employees that are currently employed. This information was required in order to assist the State in determining whether the bidder was qualified to receive the award. With regards to references, the IFB required detailed information on at least three business references that Stealth had done business with in the past five years. Stealth provided the names of four references. However, these references each involved minimal services provided to a company for not more than a day or two – services that do not in any way reflect the breadth of service contemplated under the contract. For example one of the references listed was for guarding a tent in the parking lot of Bass Pro Shops the night prior to Black Friday. The other references are similar in nature. SMSC maintains that Stealth's bid did not contain references for the business contemplated under the contract – that is complete and comprehensive high level security for a significant business enterprise such as a multiple campus college. Stealth's bid failed to include all of the information required under the IFB. The reference information submitted by Stealth was not reflective of a bidder who possessed the qualifications, experience and expertise to perform a contract of this size and scope. As such, Stealth's bid was materially non-responsive and should have been rejected.

II. The Determination that Stealth was a responsible party is erroneous.

S.C. Reg. 19-445.2125 sets forth the factors to be considered by the State in determining the responsibility of a prospective vendor. They include whether a prospective vendor has:

- a. available the appropriate financial, material, equipment, facility and personal resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- b. a satisfactory record of performance;
- c. a satisfactory record of integrity;
- d. qualified legally to contract with the State; and
- e. supplied all necessary information in connection with the inquiry concerning responsibility.

SMSC contends that Stealth is a non-responsible vendor and that the procurement officer's determination that Stealth is a responsible bidder was arbitrary, capricious and erroneous as a matter of law. Upon information and belief, Stealth had only been in operation for a few months prior this solicitation. The references that were provided were woefully inadequate and did not reflect in any way that Stealth has a satisfactory record of performance or the ability to simply perform the contract as contemplated. Upon information and belief, MMO did not request any financial information to determine if Stealth had the financial resources to meet all contractual requirements. Indeed, it appears that MMO did request a D&B report that reflected Stealth to be a high financial risk with little to no credit capabilities. This is a significant contract for FDTC and the responsibility requirements under the regulation are designed to avoid putting the State at risk by contracting with a company without the appropriate resources to meet the contract requirements and without any record of performance. Furthermore, SMSC contends that the information submitted by Stealth does not sufficiently support a determination that Stealth is qualified legally to perform the services as contemplated under the contract. Simply put, SMSC contends that Stealth does not have the experience, qualifications and expertise to meet all the contractual requirements of a contract of this nature and size.

The facts dictate a determination that Stealth is a non-responsible bidder. MMO's responsibility determination was arbitrary, capricious, based on mistaken and incomplete information. Stealth's bid should be rejected, the intent to award cancelled and the award should be made to SMSC.

Upon administrative review, Stealth's bid must be rejected as nonresponsive. Furthermore, SMSC is requesting that the CPO reject Stealth's bid based on a determination that Stealth is a non-responsible bidder. With the rejection of Stealth's bid, the award should be made to SMSC in accordance with the Code as the lowest responsive responsible bidder.

Chief Procurement Officer

December 30, 2010

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SMSC will rely on these arguments and such additional information as may become available through the course of our Freedom of Information Act request and further investigation. We look forward to the administrative review and hearing of this protest and presenting our proof.

With my kindest regards, I am

Very truly yours,



E. Wade Mullins III

JES:dea

cc: Keith McCook, Esq.
Molly Crum, Esq.
Randy Sturkey